Federal Aviation Administration
Drug Abatement Division (AAM-800)
Policy Position

Number: 95-PP-3 **Date**: 8/16/95

Applicability:

- ☐ Antidrug Program
- ☐ Alcohol Misuse Prevention Program
- ☒ Both

CFR Reference(s):

- ☒ 14 CFR part 121
- ☐ 49 CFR part 40
- ☐ None

Subject: Simulator Instructors

Subtopic(s):

Issue

Whether persons who provide simulator instruction are performing safety-sensitive duties.

Background

Ground instructor duties were not included as a covered safety-sensitive function in the alcohol misuse prevention program final rule and were eliminated from the covered safety-sensitive functions in the antidrug rule effective September 19, 1994.

Flight instructor duties remain covered under both rules.

Policy Position

The FAA considers simulator instruction, which substitutes for in-aircraft instruction, to be flight instruction.

Flight instructor duties related to part 121 and 135 certificate holders as part of required training programs are considered safety-sensitive functions under both rules.

Therefore, personnel who provide simulator instruction, directly or by contract, to part 121 and 135 certificate

holders as part of required training programs must be subject to the testing and other requirements of the antidrug and alcohol misuse prevention rules.

References/Sources

1. Preamble discussion, "Employees Covered by the Antidrug Rule," (59 FR 42925) of the August 19, 1994, antidrug final rule

2. Preamble discussion, "Employees Subject to the Rule," (59 FR 7381-82) of the February 15, 1994, alcohol misuse prevention program final rule

Federal Aviation Administration
Drug Abatement Division (AAM-800)
Policy Position

Number: 95-PP-5 **Date**: 8/17/95

Applicability:

- ☐ Antidrug Program
- ☐ Alcohol Misuse Prevention Program
- ☒ Both

CFR Reference(s):

- ☐ 14 CFR part 121
- ☒ 49 CFR part 40; preamble to July 25, 1995 NPRM
- ☐ None

Subject: Electronic Signatures

Subtopic(s):

Issue

Are electronic signatures permitted in the industry alcohol misuse prevention and antidrug programs?

Background

In an electronic signature system, an individual using a pen-like stylus signs an electronic pad connected to a computer system. The signature is recorded electronically by the computer system and incorporated into a data base, without any technical need for a paper signature or printout.

The issue of electronic signatures was not addressed in either the antidrug or the alcohol misuse prevention program final rules.

49 CFR part 40 currently requires signatures on a multiple-copy paper form. Copies of the form are distributed to the employer, employee, and MRO and laboratory or BAT. It is not known how these requirements would be met using electronic signatures.

Although currently no drug testing service providers are using electronic signatures, some alcohol testing service providers have been using this technology. A digital-image signature is printed on the testing form, rather than an actual signature.

Policy Position

49 CFR part 40 does not provide for the use of electronic signatures, and service providers must discontinue the use of this technology.

Federal Aviation Administration
Drug Abatement Division (AAM-800)
Policy Position

Number: 95-PP-6 **Date**: 8/28/95
Applicability:

- ☐ Antidrug Program
- ☐ Alcohol Misuse Prevention Program
- ☒ Both

CFR Reference(s):

- ☒ 14 CFR part 121, appendix I and J
- ☐ 49 CFR part 40
- ☐ None

Subject: Supervisory Training

Subtopic(s):

Issue

Is written correspondence alone sufficient for supervisory training?

Background

The drug and alcohol rules each require supervisors who may make reasonable cause and reasonable suspicion determinations, respectively, to have training on specific, contemporaneous physical, behavioral, and performance indicators of probable drug use and alcohol misuse.

Supervisors who will make reasonable cause determinations under the antidrug rule are also required to participate in a reasonable recurrent training program during subsequent years.

There is no requirement for recurrent training in the alcohol misuse rule.

Policy Position

Supervisory training under both rules requires more than just written correspondence. The FAA requires that the training consist of interactive briefings, seminars, or meetings between the employees or supervisors and substance

abuse experts/Employee Assistance Program specialists and/or the showing of comprehensive videos moderated by a knowledgeable person.

References/Sources

14 CFR part 121, appendix I, VIII, B
14 CFR part 121, appendix J, VI, B

Federal Aviation Administration
Drug Abatement Division (AAM-800)
Policy Position

Number: 95-PP-7 **Date:** September 14, 1995

Applicability:

- ☐ Antidrug Program
- ☐ Alcohol Misuse Prevention Program
- ☒ Both

CFR Reference(s):

- ☒ 14 CFR part 121
- ☐ 49 CFR part 40
- ☐ None

Subject: Permanent Bar/Prohibited Conduct

Subtopic(s): Records of test results and other information.

Issue

Must employers obtain records of test results and other information from prior employers for all new hires?

Background

The Federal Aviation Administration's (FAA) antidrug and alcohol misuse prevention program regulations prohibit employers from using an individual to perform a safety-sensitive function if the individual has become subject to the permanent bar provisions of the regulations or if the individual has engaged in conduct prohibited by these regulations and has not completed the required steps to return to the performance of safety-sensitive functions.

Policy Position

There is no explicit regulatory requirement that an employer obtain records of test results and other information from prior employers. Therefore, if employers are not obtaining such records from prior employers, they will not be cited for noncompliance. However, if employers use "unqualified" individuals to perform safety-sensitive functions (i.e., individuals who are subject to the permanent bar provisions or who have engaged in conduct prohibited by the rules and

have not met all requirements necessary to return to the performance of safety-sensitive functions), then the employer could be subject to enforcement consequences.

The FAA believes that obtaining records from prior employers is a "best practice" which employers should adopt to avoid noncompliance. Although it would be best to check with all prior employers, it would be reasonable to check only with those employers required under the regulations to maintain records pertaining to the applicant (i.e., employers for which the applicant performed safety-sensitive functions during the previous five years).

Employer release of information regarding an employee's records requires the specific written consent of the employee authorizing the release to an identified individual. If the employee provided appropriate written consent, the employer must release the records to a subsequent employer or other identified individual. The employer must promptly provide the records requested by the employee.

References/Sources

1. Preamble discussion, "Prohibition of Service; Rehabilitation and Evaluation," (59 FR 42922-42924) of the August 19, 1994, antidrug final rule.

2. 14 CFR part 121, appendix I, VI, F. Permanent Disqualification From Service.

3. 14 CFR part 121, appendix I, VI, D. Release of Drug Testing Information.

4. Preamble discussion, "Prohibited Alcohol Related Conduct," (59 FR 7382-7383), "Consequences of Engaging in Misuse of Alcohol or Refusing to Submit to Testing," (59 FR 7385-7386) of the February 15, 1994, AMPP final rule.

5. 14 CFR part 121, appendix J, V. Consequences for Employees Engaging in Alcohol-Related Conduct.

6. 14 CFR sections 63.12b, 65.23, 65.46, 121.455, 121.458, 135.249, and 135.253.

Federal Aviation Administration
Drug Abatement Division (AAM-800)
Policy Position

Number: 95-PP-11 **Date**: September 29, 1996
Applicability:

- ☐ Antidrug Program
- ☐ Alcohol Misuse Prevention Program
- ☒ Both

CFR Reference(s):

- ☒ 14 CFR part 121, appendix I and J
- ☐ 49 CFR part 40
- ☐ None

Subject: Prorated Random Selections Due to Variations in Size of Safety-Sensitive Populations

Issue

How does the employer ensure that it has tested a sufficient number of covered employees to meet the required minimum annual percentage rate set by the Administrator when the number of covered employees in the pool/s keeps changing?

Background

14 CFR part 121, appendices I and J require that random antidrug and alcohol tests be conducted at an annual rate determined by the Administrator and spread evenly throughout the year. (The FAA has interpreted the latter requirement to mean that selection will be made at least quarterly.)

Policy Position

Because any population of covered employees could be continuously changing, the following formula should be used to determine the number of tests to be conducted each testing period:

> **The number of covered employees times the required random rate for the calendar year divided by the number of selections the employer intends to make that year.**

Example

#1. In January of 1995, the employer has 200 covered employees in the random pool and decides to test quarterly this calendar year. The employer would take the 200 covered employees X 0.25 (current random testing rate) % 4 (quarterly means 4 times a year) = 12.50 people to be tested. The employer would test 13 employees that testing period.

#2. At the next testing period, the employer now has 100 covered employees in the random pool due to layoffs. The employer again would use the above-mentioned formula and take the 100 covered employees X 0.25 % 4 = 6.25 people to be tested. The employer would test 7 employees at that testing period.

#3. At the third testing period, the employer finds that due to an unexpected busy season and many hires there are now 150 covered employees in the random pool. The employer, once again using the above-mentioned formula, would take the 150 covered employees X 0.25 % 4 = 9.37 to be tested. The employer would now test 10 employees this testing period.

#4. At the fourth and final testing period, the employer still has 150 employees and, therefore, selects 10 employees for testing. The total number of tests performed for the year is 40. This approximates the number that would have been required (38) had the employer maintained its average population (150 employees).

Federal Aviation Administration
Drug Abatement Division (AAM-800)
Policy Position

Number: 95-PP-13 **Date: 11/7/95**

Applicability:

- ☐ Antidrug Program
- ☐ Alcohol Misuse Prevention Program
- ☒ Both

CFR Reference(s):

- ☐ 14 CFR part 121
- ☒ 49 CFR part 40
- ☐ None

Subject: Federal Drug Testing Custody and Control and Breath Alcohol Testing Forms

Subtopic(s):

Issue

Can a laboratory receive both the Federal Drug Testing Custody and Control Form (with the specimens for testing) and the employer's copy of the Breath Alcohol Testing Form (with the test results) in a case where an employee is providing a urine specimen and a breath test is conducted at the same time?

Background

Sections 40.23(a)(6) states in part "...*personal identifying information on the donor (other than the social security number) may not be provided to the laboratory*." DOT has interpreted this to mean that information which would identify an individual should not be routinely provided to the laboratory.

Additionally, Section 40.65(i)(2) states in part "...*the BAT shall ensure immediate transmission to the employer of results*...."

DOT provided further clarification in its Guidance on the Role of Consortia and Third-Party Administrators in DOT Drug and Alcohol Testing Programs published on July 25, 1995 in the Federal Register which stated in part "...*MROs and BATS*

must send final individual test results directly to the actual employer as soon as the results are available...results may be maintained afterwards by the C/TPA...while there is no objection to the MRO or BAT transmitting results simultaneously both to the employer and to the C/TPA, it is not appropriate for the MRO or BAT to send the results only to the C/TPA, which subsequently retransmits them to the employer."

Policy Position

A laboratory, regardless of what type of arrangement it has with the employer, is prohibited from receiving the employer's copy of the Breath Alcohol Testing Form together with the Federal Drug Testing Custody and Control Form(s) which accompany the urine specimen. The breath testing form contains individual identifying information. The DOT rule specifically states that this information may not be provided to a laboratory.

However, a laboratory functioning as a consortium/third party administrator (C/TPA) may receive the employer's copies of the Federal Drug Testing Custody and Control Form and the employer's copy of the Breath Alcohol Testing Form from the collection site under the following provisions:

a. The employer's copy of the Federal Drug Testing Custody and Control Form (Copy 7) must not be included with the laboratory copies (Copies 1 and 2) which accompany the urine specimen.

b. The employer's copies of the Federal Drug Testing Custody and Control Form and the Breath Alcohol Testing Forms must not be received by the accession/receiving (testing) section of the laboratory.

These procedures should prevent that portion of the laboratory which conducts the drug analysis from having access to the identify (from the alcohol testing form) of the donor.

The DOT rule requires the BAT to immediately transmit the results to the employer, regardless of what procedures have been established for providing to the employer or the C/TPA, the employer's copy of the breath testing form.

In all instances, it is the employer (not the C/TPA) who designates in writing to the BAT or the BAT's company, who

the employer’s agent is and the procedures that the employer wants the BAT to use for transmission of data and forms. (OST Guidance Interpretation)

References/Sources

49 CFR part 40

Guidance on the Role of Consortia and Third-Party Administrators in DOT Drug and Alcohol Testing Programs published on July 25, 1995 in the Federal Register.

Office of Drug Enforcement and Program Compliance Interpretation of 49 CFR part 40 (1995)

Federal Aviation Administration
Drug Abatement Division (AAM-800)
Policy Position

Number: 95-PP-14 **Date: 11/7/95**

Applicability:

- ☐ Antidrug Program
- ☐ Alcohol Misuse Prevention Program
- ☒ Both

CFR Reference(s):

- ☒ 14 CFR part 121, appendix I and J
- ☒ 49 CFR part 40
- ☐ None

Subject: Substance Abuse Professional (SAP) Referral

Subtopic(s):

Issue

Is the provider of the SAP evaluation prohibited from providing either direct treatment services or referring the employee to services provided by any treatment facility with which they are affiliated?

Background

14 CFR part 121, appendix I, VII, D and appendix J, VI, C, require that an employer ensure that *a SAP who determines that a covered employee requires assistance in resolving problems with alcohol misuse does not refer the employee to the SAP's private practice or to a person or organization from which the SAP receives remuneration or in which the SAP has a financial interest.*

Policy Position

SAPs are prohibited from referring an employee to themselves or to any program with which they are financially connected.

SAP referrals to treatment programs must not give the impression of a conflict of interest.

However, this prohibition is waived when a SAP refers an employee for assistance through a public agency; the

employer or person under contract to provide treatment on behalf of the employer; the sole source of therapeutically appropriate treatment under the employee's health insurance program; or the sole source of therapeutically appropriate treatment reasonably accessible to the employee. (OST Guidance Interpretation)

References/Sources

14 CFR part 121, appendix I, VII, D

14 CFR part 121, appendix J, VI, C

Office of Drug Enforcement and Program Compliance Interpretation of 49 CFR part 40 (1995)

Federal Aviation Administration
Drug Abatement Division (AAM-800)
Policy Position

Number: 95-PP-43 **Date**: January 24, 1996
Applicability:

- ☐ Antidrug Program
- ☐ Alcohol Misuse Prevention Program
- ☒ Both

CFR Reference(s):

- ☒ 14 CFR part 121
- ☐ 49 CFR part 40
- ☐ None

Subject: Substance Abuse Professional (SAP)

Subtopic(s): Miscellaneous Policies

Background

The FAA drug [59 FR 42922; August 19, 1994] and alcohol [59 FR 7380; February 15, 1994] rules require an evaluation by a qualified SAP following violations of 14 CFR part 121, appendices I and J.

Policy Positions

1. A SAP's decision that an individual needs an education program constitutes a clinically based determination that the individual requires assistance in resolving problems with alcohol misuse and controlled substance use. In other words, education is considered assistance. The SAP cannot provide the recommended education except as permitted by DOT rules.

2. The rules require that an employee who is in violation be evaluated by a qualified SAP. An evaluation by a qualified SAP rarely takes more than one diagnostic session. Accordingly, an in-person SAP evaluation is required. Even in remote places with limited resources, a face-to-face evaluation is required.

References/Sources

14 CFR part 121, appendix I and J

Office of Drug Enforcement and Program Compliance Guidance Interpretation (1995)

Federal Aviation Administration
Drug Abatement Division (AAM-800)
Policy Position

Number: 96-PP-45 **Date**: March 19, 1996

Applicability:

- ☐ Antidrug Program
- ☐ Alcohol Misuse Prevention Program
- ☒ Both

CFR Reference(s):

- ☒ 14 CFR part 121
- ☒ 49 CFR part 40
- ☐ None

Subject: Terminology To Be Used for Drug/Alcohol Test Results

Subtopic(s): Is a confirmed alcohol test result in the 0.02 to 0.039 range considered a "positive" test?

Issue

What is the proper terminology to be used for drug and alcohol test results?

Background

14 CFR part 121, appendix J generally does not refer to "positive" or "negative" test results. In most references, the rule uses the term "alcohol concentration" followed by the appropriate numeric concentration when referring to the results of alcohol tests. Similarly, appendix I was amended in 1994 to ensure that all provisions addressing drug test results referred to either "verified positive" or "verified negative" results.

Policy Position

The terms "positive" and "negative" were historically used in various documents referring to drug testing. To avoid confusion between the alcohol and drug rules, employers should be encouraged to use "alcohol concentration" in relation to alcohol test results between 0.02 and 0.039 in

any written document produced or in any conversations held with employees, and to refer to alcohol tests with results at or above 0.04, and only such results, as “violations.” An alcohol test with an alcohol concentration of less than 0.02 should be referred to as a “negative” test result.

Employers should be encouraged to use the term “verified” drug test results to further clarify references, since action can only be taken on a verified (not confirmed) positive drug test (e.g., removal), or a verified negative result (e.g., return to duty).

Because any alcohol test result of 0.02 or greater does indicate the presence of alcohol, it is not improper for employers to use that term for all test results at or above 0.02. However, inspectors should ensure that employers who do use the term “positive” when referring to alcohol tests understand that the consequences of having a breath alcohol concentration in the 0.02 to 0.039 range are different and somewhat limited compared to the consequences that occur at an alcohol concentration of 0.04 or above. It is especially important that information contained in the employer’s required educational material/policy document clearly states the differences.

References/Sources

49 CFR part 40

14 CFR part 121, appendices I and J

Federal Aviation Administration
Drug Abatement Division (AAM-800)
Policy Position

Number: 95-PP-46 **Date**: March 19, 1996

Applicability:

- ☐ Antidrug Program
- ☐ Alcohol Misuse Prevention Program
- ☒ Both

CFR Reference(s):

- ☒ 14 CFR part 121
- ☐ 49 CFR part 40
- ☐ None

Subject: Refusal to Test and Permanent Bar

Subtopic(s):

Issue

Does a refusal to test count toward the permanent bar?

Background

The permanent bar provision implements a provision of the Omnibus Transportation Employee Testing Act of 1991 under which an individual who engages in on duty use of drugs or alcohol or in other prohibited drug use or alcohol misuse on two occasions is prohibited from ever performing the same safety-sensitive function directly or by contract that he/she performed prior to the triggering violation for any covered employer.

Policy Position

As set forth in regulation and interpretation, a number of actions can constitute refusing to submit to testing; these include failure by an employee to complete and sign the required drug/alcohol testing form, to provide a urine specimen or a breath or saliva sample, or otherwise to cooperate in a way that prevents the completion of the testing process. Under some circumstances, these refusals are violations of the drug or alcohol rules, with regulatory consequences.

As defined, however, a refusal to submit to required drug or alcohol testing is not the type of conduct that could trigger a permanent bar. Only conduct related to the use of drugs or alcohol counts toward the permanent bar. However, the FAA can take action to deny, suspend, or revoke an airman certificate based on such a refusal.

The permanent bar can be triggered by any test conducted under the FAA's antidrug rule, since any verified positive drug test indicates that the individual engaged in prohibited drug use. On the other hand, because only alcohol tests associated with the performance of safety-sensitive functions can give rise to a violation, positive pre-employment and return to duty alcohol tests (which do not constitute violations) do not count toward the bar.

One instance of on-duty use of drugs or alcohol triggers the permanent bar immediately.

References/Sources

14 CFR part 121, Appendices I and J

49 CFR part 40

Federal Aviation Administration
Drug Abatement Division (AAM-800)
Policy Position

Number: 95-PP-47 **Date**: May 1, 1996

Applicability:

- ☐ Antidrug Program
- ☐ Alcohol Misuse Prevention Program
- ☒ Both

CFR Reference(s):

- ☒ 14 CFR part 121
- ☐ 49 CFR part 40
- ☐ None

Subject: Employment Consequences

Subtopic(s):

Issue

Can, or must, an employer terminate an employee who receives a verified positive drug test result or an alcohol test result with a concentration of 0.02 or greater?

Background

There is no requirement in the antidrug and alcohol misuse rules that an employee who receives a verified positive drug test result or an alcohol confirmation test result of 0.02 or greater be terminated. Nor is there any regulatory requirement that the employer retain the individual.

However, the rules do require that an employee be removed from performing safety-sensitive duties following a verified positive drug test or an alcohol confirmation test result of 0.02 or greater. The rules also provide for an employee's return to duty in a safety-sensitive position provided the return to duty requirements of each rule are met.

In addition, the rules require that employers permanently prohibit a covered employee from performing his or her safety-sensitive function if the covered employee is determined to have two verified positive drug tests conducted after September 19, 1994, or to have violated the

prohibited alcohol-related conduct provisions, other than on-duty use, twice after the employee becomes subject to the prohibitions. On-duty use of either drugs (after 9/19/94) or alcohol permanently precludes an employee from performing the safety-sensitive function that was being performed at the time of the violation.

Policy Position

The FAA has determined that final employment decisions should be left to the discretion of the employer with the hope that employers will use this discretion reasonably and consider each employee’s entire work history.

In addition, any termination that does occur should be consistent with any applicable state laws, labor-management agreements, etc.

Federal Aviation Administration
Drug Abatement Division (AAM-800)
Policy Position

Number: 96-PP-7 **Date**: August 19, 1996

Applicability:

☒ Antidrug Program
☒ Alcohol Misuse Prevention Program
☐ Both

CFR Reference(s):

☒ 14 CFR part 121
☒ 49 CFR part 40
☐ None

Subject: Payment for Substance Abuse Professional (SAP) evaluation and/or treatment

Issue: Is the employer compelled to pay for an employee's SAP evaluation and/or subsequent substance abuse treatment?

Background: The Department of Transportation's rules are silent regarding payment for the SAP evaluation and any subsequent treatment that the SAP recommends.

Policy Position: The employer is not compelled to pay for an employee's SAP evaluation and/or subsequent substance abuse treatment. In many circumstances, the SAP and treatment payment issues are part of labor-management negotiations. The costs can be borne by the employer, the employee, the employee's insurance carrier, or through some other means. The DOT requires that an employer provide an employee who violates the rules with a list of qualified SAPs and substance abuse treatment programs (the names, addresses, and telephone numbers). These SAPs and treatment resources should be reasonably accessible (e.g., within the general commuting area) to the employee. In no case should the employee be required pay for the list of SAPs and treatment programs. This list must be provided at no cost by the employer.

References/Sources: Department of Transportation, Drug Enforcement and Program Compliance Office, 49 CFR Part 40 Interpretation Notice (8/1996).